OGLALA SIOUX TRIBE
v.
AREA DIRECTOR, ABERDEEN AREA OFFICE, BUREAU OF INDIAN AFFAIRS

IBIA 88-12-A Decided August 18, 1988

Appeal from a letter of the Aberdeen Area Director concerning access by auditors for the Oglala Sioux Tribe to information concerning the Oglala Sioux Tribal Land Acquisition Enterprise.

Affirmed.

1. Board of Indian Appeals: Jurisdiction--Bureau of Indian Affairs: Administrative Appeals: Generally

A letter signed by a Bureau of Indian Affairs official which has the effect of denying relief to an appellant is appealable pursuant to 25 CFR Part 2 even though the letter states that the official is unable to decide the appeal at that time.

2. Bureau of Indian Affairs: Generally--Claims against the United States

28 U.S.C. § 516 (1982) vests the Department of Justice with authority to control the defense of litigation pending in the United States Claims Court. Bureau of Indian Affairs officials are without authority to override the decisions of Justice Department attorneys concerning conduct of the litigation.

APPEARANCES: S. Bobo Dean, Esq., Washington, D.C., for appellant; Duard R. Barnes, Esq., Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., for appellee.

OPINION BY ADMINISTRATIVE JUDGE VOGT

Appellant Oglala Sioux Tribe seeks review of a September 15, 1987, letter of the Aberdeen Area Director, Bureau of Indian Affairs (appellee; BIA), concerning a request that appellant's auditors be given access to certain information for purposes of performing an audit of the Oglala Sioux Tribal Land Acquisition Enterprise (OSTLAE) for FY 1986. For the reasons discussed below, the Board affirms that letter.

Background

On six occasions between 1971 and 1983, appellant received loans from the Farmers Home Administration (FmHA) pursuant to 25 U.S.C. §§ 488-492 (1982) for the purpose of acquiring lands or interests in lands within the Pine Ridge Reservation. As security for the loans, appellant assigned to FmHA gross revenues of OSTLAE. Appellant also entered into memoranda of understanding with BIA and FmHA in 1976, 1977, and 1983 to implement the FmHA requirement for a specific plan for maintenance of land records and collection of revenues of OSTLAE. Under the memoranda, BIA assumed principal responsibility for maintaining the records and collecting the OSTLAE revenues and was made "custodian of all income and revenues pledged for the repayment of the FmHA land purchase loans." BIA also agreed to "supply authorized Tribal, BIA amd FmHA officials with current data with regard to acreage, lease income, uncollected lease fees by classification and funds available." 1976 and 1983 memoranda, sections 1.1, 3.1, and 1.2(D). As required by FmHA and the tribal resolutions authorizing the loans, appellant retained certified public accountants to perform annual audits of OSTLAE. The audits were apparently performed without incident until FY 1986.

On December 13, 1985, appellant filed a petition in the United States Claims Court, Oglala Sioux Tribe v. United States, Docket No. 735-85L, alleging mismanagement by BIA in its administration of the OSTLAE program. In January 1987, appellant's auditors attempted to obtain certain information from the Pine Ridge Agency (agency), BIA, for purposes of preparing the FY 1986 audit of OSTLAE. Agency employees sought advise from the Justice Department attorney who was handling the Claims Court case for the United States. The attorney evidently advised the BIA employees not to release the information to the auditors because it was involved in a discovery dispute in the lawsuit. The auditors called the Justice Department attorney about the matter. On April 29, 1987, the Justice Department attorney wrote to appellant's attorneys, stating:

> Ms. MarGret Barney [1/] recently contacted this office concerning a January 13, 1987 request for information to the client agency for uncollected or unpaid lease or permit receivables which were due and payable on September 30, 1986 by leased or permitted tract. This request is identical to discovery requests now subject to a discovery dispute.
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> Ms. Barney also apparently seeks to interrogate client agency personnel concerning procedures employed in the collection of accounts receivable. This is also the subject of discovery requests which are part of the current dispute.

1/ Ms. Barney was apparently an employee of the accounting firm retained by appellant to conduct the audit.

> Since it is apparently your intent to pursue these matters further, it is our firm position that all requests for information of these types should be made through discovery requests, written or by deposition, from you as plaintiff's counsel to us as government counsel. No direct contact should be made by [the accounting firm] with client agency personnel except through counsel. This will assure the proper conduct of discovery.

Appellant's attorneys wrote to the agency Superintendent about the matter on May 1, 1987. On May 12, the Superintendent responded, deferring to the April 29 Justice Department letter and stating that all future requests should be directed to the Justice Department attorney.

Appellant construed the Superintendent's letter as a decision to withhold the information sought by appellant's auditors. It therefore appealed to appellee by letter of June 11, 1987. Appellant corresponded further with appellee in letters dated June 30 and September 9, 1987. In August 1987, the auditors submitted their audit report to appellant. The transmittal letter stated:

> Because of the limitations placed on our examination concerning the records controlled by the Bureau of Indian Affairs, it was not practical for us to determine the accuracy of the interest income, lease income, and related lease receivables as of and for the year ended September 30, 1986. In addition, because the action against the Bureau of Indian Affairs has not been resolved, it was not practicable for us to determine the accuracy of the number of acres leased or the status of the amounts recorded as Accounts Receivable--Overpayments, on the accompanying balance sheets.
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> Because the scope of our examination was not sufficient regarding lease revenues, interest income, and related receivables, and because the enterprise is delinquent on its payment on all long-term debt obligations, and that these items enter materially into the determination of financial position, results of operations and changes in financial position, we are not able to express an opinion on the financial statements referred to in the first paragraph.

By letter of September 18, 1987, to its auditors, appellant stated that the audit report was unacceptable because of the scope limitation.

During August 1987, appellant's auditors and the Justice Department attorney communicated with each other by telephone and letter concerning the information needed by the auditors and the reasons for the auditors' "denied opinion". In a letter dated August 27, 1987, the auditors stated:

> In our letter of May 20, 1987, we requested three specific items, and the fourth was for an opportunity to determine what internal control would be in effect and to gain some information as to the reliability of the data provided in numbers 1, 2, and 3. [2/] In your letter to [appellant's attorney] dated April 29, 1987, which we were provided a copy, we were denied all direct contact with client and agency personnel, except through counsel, and that all information passed in this way had to be by deposition. Because of this restriction and the costly nature of conducting an audit in this manner, we determined that this was effectively a scope limitation.

By letter of September 15, 1987, appellee informed appellant that its appeal could not be decided at that time because the discovery dispute in the Claims Court had not been resolved. By letters of September 18 and 23, 1987, appellant continued to request appellee to allow its auditors access to the requested information and, by letter of October 8, 1987, it appealed appellee's September 15 letter to the Assistant Secretary--Indian Affairs.

By letter of December 18, 1987, appellant requested the Board to assume jurisdiction over its appeal pursuant to 25 CFR 2.19, 3/ stating that the appeal had been ripe for decision for more than 30 days but no decision had been rendered. Appellant stated that appellee's September 15 letter was in effect a decision to deny appellant's auditors access to the requested information. On December 22, 1987, the Board made a preliminary determination that it had jurisdiction over the appeal. The administrative record was received on March 28, 1988. Both appellant and appellee filed briefs before the Board.

Jurisdiction

Although appellee stated in his September 15 letter that he was unable to decide appellant's appeal at that time, appellant contended in its initial filing with the Board that the letter effectively denied appellant's

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2/ The May 20 letter, addressed to appellant's attorney, identified the information needed to complete the audit as:

"1. The amount of uncollected permit income by range unit.
"2. The amount of uncollected lease income by tract and lessee.
"3. The amount of trespass revenue collected by tract.
"4. General questions regarding internal account control."

3/ 25 CFR 2.19 provides in relevant part:

"(a) Within 30 days after all time for pleadings (including extension granted) has expired, the Commissioner of Indian Affairs [or BIA official exercising the administrative review authority of the Commissioner] shall:

"(1) Render a written decision on the appeal, or

"(2) Refer the appeal to the Board of Indian Appeals for decision.

"(b) If no action is taken by the Commissioner within the 30-day time limit, the Board of Indian Appeals shall review and render the final decision."

auditors access to the requested information and was therefore a decision appealable under 25 CFR Part 2. In its preliminary jurisdictional determination, the Board specifically gave the parties an opportunity to challenge the Board's jurisdiction over this appeal. No party has done so.

[1] Upon review of the record, as discussed below, the Board concludes that appellee's September 15 letter had the effect of denying appellant the relief it requested and was therefore a decision which could be appealed pursuant to 25 CFR Part 2. Accordingly, the Board has jurisdiction over this appeal.

Discussion and Conclusions

Appellant argues that BIA is obligated by the 1979 and 1983 memoranda of understanding to allow appellant's accountants access to the requested information. It also argues that as a trustee, BIA has a duty to make the records available to its beneficiary. Appellant further argues that the pending litigation does not alter the trust and contract relationships between appellant and BIA. Finally, appellant argues that the information sought by its accountants is not the subject of a discovery request in the Claims Court case.

Appellee responds that he properly deferred to the Department of Justice attorney with respect to the manner in which the information sought by appellant should be made available. Since the Department of Justice has the responsibility for defense of the United States in the Claim Court litigation and has advised appellee that the information sought by appellant implicates that defense, appellee contends that he is without authority to make the information available without the approval of the Department of Justice, and therefore appellant's remedy lies in discovery negotiations with attorneys from that Department. Appellee states that the principal disagreement between appellant and appellee does not concern release of the specifically identified information but, rather, the manner in which information would be obtained orally from BIA employees.

Although some of appellant's arguments imply that BIA has denied access to the requested information entirely, appellant acknowledges that BIA is willing to make the information available through the discovery process. Appellant does not assert that it cannot obtain the information it needs through the discovery process. The issue in this appeal, therefore, is not whether BIA may deny appellant access to the information needed to complete the FY 1986 audit, but whether it may limit the manner in which appellant obtains the information by requiring that discovery procedures be followed.

Appellant argues that the information requested by its auditors is not the subject of any discovery request made by appellant in the Claims Court case. It states that most of its proposed proof in the pending litigation, including the information it seeks in discovery, is limited to the years 1979-1983. There is no copy of appellant's original discovery request in the record. However, appellant has submitted a copy of the November 4, 1987, supplemental response of the United States to appellant's discovery

requests. The response indicates that appellant requested, inter alia, "a calculation of accounts receivable by calendar year for leases, by permit year for permits, and a statement of accounts receivable as of August 1, 1987 with a listing of the types of documents used to prepare the calculation." It also shows that defendant requested other documents relating to the years 1977-1986. From this document it appears that appellant's discovery request included information similar to the information requested by the auditors for the FY 1986 audit.

The Board finds that appellant has not shown that the information sought by its auditors falls outside the scope of appellant's discovery request in the Claims Court case.

Appellant cites the 1979 and 1983 memoranda of understanding, 25 CFR 150.11, 4/ and several authorities on trust law in support of its argument that BIA is required to make the requested information available to appellant. None of these documents or authorities, however, specifies the manner in which the information is to be made available. Appellant has not shown they would preclude the imposition of discovery requirements when the requested information is also the subject of a discovery request in litigation between the parties.

Appellant also relies on District of Columbia Legal Ethics Committee Opinion No. 80 (Dec. 18, 1979) (Communication by Lawyer Representing a Client with Government Officials), the comment to Model Rules of Professional Conduct, Rule 4.2 (1987), 5/ and an excerpt from C. Wolfram, Modern Legal Ethics 614-615 (1986). These authorities discuss application of the rule of legal ethics concerning attorney communications with government officials. The rule under discussion, however, pertains to attorney conduct and does not purport to govern the conduct of the government officials concerned. Thus, even though the authorities cited may show that appellant's attorneys did not violate the rule by communicating directly with BIA officials, they are not helpful in assessing appellee's action.

[2] 28 U.S.C. § 516 (1982) provides: "Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or

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4/ 25 CFR 150.11 provides in relevant part:

"(a) The usefulness of a Land Titles and Records Office depends in large measure on the ability of the public to consult the records contained therein. It is therefore the policy of the Bureau of Indian Affairs to allow access to land records and title documents unless such access would violate the Privacy Act, 5 U.S.C. 552a or other law restricting access to such records, or there are strong policy grounds for denying access where such access is not required by the Freedom of Information Act, 5 U.S.C. 552."

5/ Rule 4.2 provides: "In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so."

officer thereof is a party, or is interested, and securing evidence therefor, is reserved to officers of the Department of Justice, under the direction of the Attorney General." Pursuant to this provision, authority to control the defense of the United States in Oglala Sioux Tribe v. United States is vested in the Department of Justice. Officials of the Department of the Interior have no authority to override the decisions of Justice Department attorneys concerning the manner in which the litigation is handled. The record in this appeal indicates that the Justice Department attorney involved concluded that the auditors' request was related to the litigation to such an extent that discovery procedures were required to be followed. The record also indicates that BIA officials thereafter deferred to the attorney.

The Board finds that BIA's deferral to the Justice Department attorney was proper. BIA had no authority, nor has the Board, to disregard the attorney's conclusions concerning conduct of the Claim Court litigation.

The Board further finds that appellant has not shown that BIA violated the 1979 and 1983 memoranda of understanding or any provision of law or regulation in deferring to the Justice Department attorney's conclusion that discovery procedures should be followed.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the September 15, 1987, letter of the Aberdeen Area Director is affirmed.

Anita Vogt
Administrative Judge

I concur:

Kathryn A. Lynn
Chief Administrative Judge

6/ Because the Board finds that the present record is sufficient to allow full resolution of the questions of law raised in this appeal, appellant's request for oral argument is denied.